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OBSCENITY LAW IN COLORADO: THE STRUGGLE TO PASS A CONSTITUTIONAL STATUTE

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I. INTRODUCTION

Despite repeated efforts of legislators over the past decade, Colorado does not have an obscenity statute that has withstood constitutional challenge. Legislative enactments in the area have either been vetoed by the governor,[1] struck down as unconstitutional by the state supreme court,[2] or repealed by the legislature in favor of a "tougher" law.[3]

The legislature's most recent attempts to control obscenity were embodied in two statutes enacted during the 1981 session. One statute prohibits the promotion of obscene material,[4] and the other statute controls children's exposure to any sexually explicit material.[5] Rulings at the trial court level have found significant constitutional defects in both of these statutes, and challenges to them are presently pending before the Colorado Supreme Court.[6]

In *Miller v. California*,[7] the United States Supreme Court reaffirmed the principle that obscenity is not protected speech under the first amendment to the Constitution and set forth specific guidelines for state legislatures to follow in regulating obscenity.[8] In light of the "how to" instructions contained in the *Miller* decision, many people in Colorado may wonder why the legislature has had such difficulty drafting obscenity legislation acceptable to all three branches of government. The following story of one legislative debate is paradigmatic of the problems the legislature has faced with the obscenity issue.

During the 1976 session, the legislature considered several approaches to outlawing obscenity[9] in the wake of the Colorado Supreme Court's decision in *People v. Tabron*,[10] which had declared the prior obscenity statute unconstitutional for failure to comply with the *Miller* standards. Republican Representative Sam Zakhem introduced a severe bill[11] making the promotion of obscenity a Class 4 Felony. When his bill was not favorably reported from

1. S. 450, 52d Gen. Assembly, 1st Reg. Sess. (1979), vetoed by the Governor May 20, 1979 (veto sustained by the House, 1979 Colo. H.J. 2298).

2. People v. New Horizons, Inc., 616 P.2d 106 (1980); People v. Tabron, 190 Colo. 149, 544 P.2d 372 (1975).

3. S. 447, 1977 Colo. Sess. Laws 982, repealed the 1976 obscenity statute enacted by H.B. 1272, 50th Gen. Assembly, 2d Reg. Sess. (1976).

4. COLO. REV. STAT. §§ 18-7-101 to -106 (Supp. 1981).

5. COLO. REV. STAT. §§ 18-7-501 to -504 (Supp. 1981).

6. *See infra* notes 106, 213, and accompanying text.

7. 413 U.S. 15 (1973).

8. *Id.* at 23-24. For a discussion of these guidelines see *supra* notes 50-54 and accompanying text.

9. H.B. 1116, H.B. 1197, and H.B. 1199, 50th Gen. Assembly, 2d Reg. Sess. (1976).

10. 190 Colo. 149, 544 P.2d 372 (1975). *See infra* notes 72-75 and accompanying text.

11. H.B. 1197, 50th Gen. Assembly, 2d Reg. Sess. (1976), 1976 Colo. H.J. 220.

committee, Zakhem vowed: "The battle is not over; I'm going to try to put the teeth back in that bill."[12]

During a floor debate on the alternative bill,[13] Zakhem proposed an amendment to outlaw "any ultimate sexual act, normal or perverted."[14] Representative Ted Bendelow criticized the Zakhem amendment for making illegal "a husband and wife exercising their normal marital rights in the privacy of their own bedroom."[15] Another representative suggested that Zakhem "should be given a lifetime membership in Zero Population Growth."[16] Zakhem's amendment thereupon went down to defeat by a vote of fifty-seven to one.[17]

Actually the written version of Representative Zakhem's amendment was not as Draconian as his colleagues had feared from his verbal description. But the above vignette illustrates the confusion that can arise when legislators, with differing values and consequently different approaches, try to formulate obscenity legislation. Some Colorado legislators have been primarily concerned with "cracking down" on obscenity; others have focused on technical adherence to the *Miller* standards; while still others have been primarily interested in limiting the possible infringement of freedom of speech by obscenity statutes. The attempts to combine these different values and approaches into one statute through the process of amendment has led to defective statutes. Rather than trying to interpret away the inconsistencies, Colorado courts have been content to strike down an entire statute or excise key portions and let the legislature continue to struggle.

This article will explore the history of obscenity law in Colorado, with special attention to the constitutional defects in past legislation and potential defects in the 1981 statutes now before the Colorado Supreme Court.

II. PRE-*MILLER* OBSCENITY LAW

A. *Statutory*

One remarkable aspect of obscenity law in Colorado is the total lack of litigation in this area before the 1970's, despite the fact that Colorado has had an obscenity statute since 1885.[18] The statute passed in that year prohibited the sale, possession, or exhibition of any "obscene, lewd, or indecent, or lascivious" publication.[19] In an attempt—not entirely successful—to go beyond tautology in its definition, the statute specifically banned "any newspaper, or magazine, containing pictures of nude, or partly nude, men or

12. Denver Post, Feb. 13, 1976 at 3, col. 1. The bill was officially postponed "indefinitely" on Feb. 26, 1976 Colo. H.J. 448.

13. H.B. 1199, 50th Gen. Assembly, 2d Reg. Sess. (1976). Zakhem also co-sponsored another bill, H.R. 1116, which provided that promotion of obscene material to minors was a class I misdemeanor. This bill was killed in committee a month after it was introduced. 1976 Colo. H.J. 123, 448.

14. 1976 Colo. H.J. 588.

15. *Smut Bill Okayed, But Sex Is Still Legal*, Denver Post, Mar. 7, 1976, at 2, col. 4.

16. *Id.*

17. 1976 Colo. H.J. 588.

18. An Act Concerning Offenses Against Public Morality, 1885 Colo. Sess. Laws 172.

19. *Id.*

women, or pictures of men or women in indecent attitudes or positions."[20] Presumably, under this statute a person could be sent to the county jail for up to one year just for selling a picture of a lady or gentleman who, although fully clothed, had adopted an indecent attitude. The same statute had provisions outlawing instruments used for "self-pollution," birth control devices or medicines of any kind, and abortifacients.[21]

This Victorian nightmare, if read out loud in a room of people even minimally versed in constitutional law, probably would provoke laughter. Nevertheless, the basic 1885 statute, including all of the language quoted above, remained the law of Colorado until *1969*.[22] In that year Colorado passed its first modern obscenity statute,[23] which attempted to comply with the prevailing United States Supreme Court authority in the area. The statute defined "obscene" as material that appealed to the "prurient" interest in sex and was "utterly without redeeming social value."[24] Those were two of the elements the Supreme Court had indicated it would look for in state obscenity statutes in the 1966 case, *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Massachusetts*.[25]

B. *Early Cases—Prior Restraints*

The first obscenity case to be decided in Colorado, *People ex rel. McKevitt v. Harvey*,[26] arose under the old statute.[27] The issue in *Harvey* was not the statute's definition of obscenity, but rather the statute's provisions for the search for and seizure of obscene materials.[28] The case involved a two and one-half hour search of the defendant's place of business by Denver police, who were armed with a search warrant.[29] During the search, the officers seized several hundred articles "which *the officers* examined and determined to be obscene."[30]

The material was used as a basis for the granting of a temporary restraining order prohibiting the sale of the material.[31] When, at a later hearing, the judge refused to continue the restraining order as to all of the publications, the district attorney appealed.[32] The defendant cross-appealed, contending that the books were unconstitutionally seized.[33]

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20. *Id.*
21. *Id.*
22. COLO. REV. STAT. § 40-9-17 (1963) repealed at 1969 Colo. Sess. Laws 321, 325.
23. COLO. REV. STAT. §§ 40-28-1 to -10 (1969).
24. *Id.* at § 40-28-1.
25. 383 U.S. 413, 418 (1966). A third element prescribed by the Supreme Court, but not mentioned explicitly in the Colorado statute, was that the material in question must be "patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters." *Id.*
26. 176 Colo. 447, 491 P.2d 563 (1971).
27. COLO. REV. STAT. §§ 40-9-17 to -27 (1963).
28. 176 Colo. at 451, 491 P.2d at 564-65.
29. COLO. REV. STAT. § 40-9-17 (1963) (which permits the issuance of search warrants under specified circumstances). *See* 176 Colo. at 448, 491 P.2d at 563.
30. 176 Colo. at 449, 491 P.2d at 563 (emphasis added).
31. *Id.*, 491 P.2d at 564.
32. *Id.*
33. *Id.*

Justice William Erickson, who has authored virtually all the majority opinions dealing with the issue of obscenity, wrote the *Harvey* opinion in which the Colorado Supreme Court held that the statutory scheme authorizing the search warrant was defective. This defect arose because the statute did not provide for an adversary hearing to determine whether the materials to be seized were in fact obscene prior to the search.[34] Instead, the statute impermissibly left the determination of whether materials were obscene to the discretion of police officers,[35] a practice that had been expressly condemned by the United States Supreme Court in *Marcus v. Search Warrant*.[36]

The Colorado court went on to state that any restraint of expression, "which is imposed in advance of a final judicial determination on the merits must be limited to the shortest fixed time period compatible with sound judicial resolution."[37] The court acknowledged the New York injunctive procedure, upheld in the United States Supreme Court case of *Kingsley Books, Inc. v. Brown*,[38] as being an acceptable form of prior restraint. The New York statute provided for "a hearing one day after joinder of issue and for a final decision two days after termination of the hearing."[39]

The Colorado court's acceptance of the *Kingsley* case was not significant at the time of *Harvey* because recent revisions of the Colorado obscenity code had eliminated provisions for restraints on material prior to a judicial determination that the material was obscene.[40] Newer obscenity statutes, however, such as the 1981 law, have gone back to providing for restraints prior to a judicial determination of obscenity.[41] The procedure set forth in the 1981 statute appears, in some respects, to comply with the New York procedure approved in *Harvey* and *Kingsley*.[42] Nevertheless, one subsection of the 1981 statute provides for temporary restraining orders in "exigent circumstances" if the underlying action is "commenced on the earliest possible date."[43] This provision may run afoul of the holding in *Harvey* that prior restraints must be limited to the "shortest *fixed* time period compatible with sound judicial resolution."[44]

The *Harvey* case ruled out searches as means for gathering evidence for obscenity prosecutions until an adversary hearing has been held and the materials have been adjudged to be obscene.[45] Law enforcement officers can

34. *Id.* at 450, 491 P.2d at 564 (citing A Quantity of Books v. Kansas, 378 U.S. 205 (1964)).

35. 176 Colo. at 451, 491 P.2d at 565.

36. 367 U.S. 717 (1961). In *Marcus* the Court held that pornography could not be dealt with as other items of "contraband" during a search. *Id.* at 730-31.

37. 176 Colo. at 150, 491 P.2d at 564 (citing Freedman v. Maryland, 380 U.S. 51 (1965)).

38. 354 U.S. 436 (1957).

39. *Harvey*, 176 Colo. at 452, 491 P.2d at 565. Joinder of issue would occur in these cases when the defendant answers the complaint for injunctive relief. BLACK'S LAW DICTIONARY 750 (rev. 5th ed. 1979).

40. *Harvey*, 176 Colo. at 452, 491 P.2d at 565. The court discussed the changes brought about by COLO. REV. STAT. § 40-7-105 (1971), which provided for injunctive relief only after the material in question had been determined obscene by means of a criminal proceeding in which someone was convicted for promoting it. *Id.*

41. COLO. REV. STAT. § 18-7-103 (Supp. 1981).

42. *See id.* at § 18-7-103(5).

43. *Id.* at § 18-7-103(3).

44. 176 Colo. at 451, 491 P.2d at 564 (emphasis added).

45. *Id.*, 491 P.2d at 565.

otherwise acquire such evidence by purchasing obscene material from its purveyors or by subpoenaing the material. It was the subpoena procedure that was challenged in *Houston v. Manerbino*,[46] which was the next recorded obscenity case in Colorado. In that case, the district attorney submitted to the court a policeman's affidavit that described in minute detail sexual acts being portrayed in films exhibited by the defendant, who was charged with violating the obscenity statute.[47] The affidavit served as the basis for the issuance of a subpoena requiring the defendant to produce the films for the purpose of an adversary hearing.[48]

The Colorado Supreme Court held that such a subpoena was not an impermissible prior restraint, because "[s]ome means had to be devised to obtain and preserve the moving pictures for the purpose of conducting an adversary hearing to determine whether the films were obscene as a matter of law."[49]

III. The Determination of Obscenity as a Matter of Law

A. Miller v. California

The Burger court's major contribution to obscenity law, *Miller v. California*,[50] was designed to make the regulation of obscenity easier by providing "concrete guidelines" for state statutes.[51] The decision did not have that effect in Colorado.

The Court in *Miller* tried to establish guidelines which would ensure that obscenity laws could regulate only "hard core" pornography.[52] For material to be denominated as such, a trier of fact would have to decide, according to *Miller*, that:

> (a) [T]he average person, applying contemporary community standards would find that the work, taken as a whole, appeals to the prurient interest . . . .
>
> (b) [T]he work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law . . . .
>
> (c) [T]he work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[53]

The *Miller* decision went on to set forth examples of the types of depictions that could be prohibited under part (b) of the above standard:

> (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.
>
> (b) Patently offensive representations or descriptions of masturbation, excretory functions and lewd exhibition of the

46. 185 Colo. 1, 521 P.2d 166 (1974).
47. *Id.* at 4, 521 P.2d at 167.
48. *Id.* at 5, 521 P.2d at 167.
49. *Id.* at 8, 521 P.2d at 169.
50. 413 U.S. 15 (1973).
51. *Id.* at 29.
52. *Id.*
53. *Id.* at 24.

genitals.[54]

B. *The First Post-*Miller *Decision*

In *People v. Berger*,[55] the Colorado Supreme Court had its first opportunity to examine an obscenity prosecution in light of the *Miller* standards. The case involved an owner of a Colorado Springs magazine exchange who was convicted of promoting obscenity.[56] The defendant sold a police officer magazines that the court described as follows:

> The photographs contained in the magazines depict nude male and female models posed in various positions. Although the magazines portray male and female genitalia, none of the photographs depicts sexual intercourse, masturbation, fellatio, cunnilingus, or other explicitly sexual conduct. In addition to the photographs, all of the magazines, except one, contained literary articles in the form of short stories comparable to those found in present day "confession" type magazines.[57]

The statute underlying this prosecution was essentially the same statute that the court overturned as unconstitutional two years later in *People v. Tabron*.[58] But the court avoided the constitutional issue in *Berger* by relying on the principle enunciated one month earlier in *Houston v. Manerbino*, that the question of whether materials were obscene was in the first instance a matter of law for the court to decide.[59] Focusing on a statement in *Miller* that states could prohibit only patently offensive "hard core" sexual conduct, the court in *Berger* stated: "In our view, while the photographs depict male and female genitals in a non-turgid state, they do not reveal any form of sexual conduct which could be categorized as 'hard core' pornography or which would be patently offensive to most people."[60] Thus, the court found the magazines to be not obscene as a matter of federal constitutional law, and did not have to reach the question of whether the statute complied with the *Miller* test.[61] By describing the threshold point in the test as being turgidity versus limpness of genitals, however, the court in *Berger* apparently ignored the comment in the *Miller* opinion that a state statute could regulate under part (b) of the standard "lewd exhibition of the genitals."[62]

Nevertheless, the *Berger* court's intentions in setting up such a standard can be better understood from the following comment: "In fact, a number of magazines on today's news stands which appeal to large segments of the community exhibit photographs of the nude human body which are comparable to those contained in the seven magazines which provide the basis for

54. *Id.* at 25.
55. 185 Colo. 85, 521 P.2d 1244 (1974).
56. *Id.* at 86, 521 P.2d at 1244.
57. *Id.* at 87, 521 P.2d at 1245.
58. 190 Colo. 149, 544 P.2d 372 (1976). *See infra* notes 72-75 and accompanying text.
59. *Berger*, 185 Colo. at 88, 521 P.2d at 1245 (also citing Jacobellis v. Ohio, 378 U.S. 184 (1964)).
60. 185 Colo. at 89, 521 P.2d at 1246.
61. *Id.*
62. *Miller*, 413 U.S. at 25.

the charges in this case."[63]

The court in *Berger* seemingly wanted to ensure that popular "centerfold" magazines, such as *Playboy*, *Penthouse*, and *Cosmopolitan*, are not subject to prosecution in Colorado.

IV. THE COLORADO CONSTITUTION AND OBSCENITY

While basing its holding on the first amendment to the federal Constitution as interpreted by the United States Supreme Court, the Colorado court in *Berger* made the following thought provoking statement:

> In order to find that the materials are obscene as a matter of law and capable of supporting a criminal prosecution, we must find not only that the obscenity standards of the statute, as construed under the First Amendment, are met, but also that there has been some abuse of freedom of speech, as envisioned under the broader protective standard of Article II, Section 10 of the Colorado Constitution.[64]

The breadth of the Colorado Constitution's protection of free speech can be seen in the language of article II, section 10:

> No law shall be passed impairing the freedom of speech; every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all abuse of that liberty; and in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact.[65]

It should be noted that the Colorado Constitution states the right in positive terms, that "every person *shall be free* to speak, write, or publish *whatever* he will *on any subject*,"[66] while the United States Constitution's proscription is stated in the negative, "Congress shall make no law . . . ."[67]

The Colorado Constitution speaks of liability for the abuse of freedom of speech, but it is clear from the context that the framers saw abuse as occurring primarily in the form of slanderous speech and libelous writings. A credible argument can thus be advanced that obscenity is protected expression under the Colorado Constitution. Nonetheless, while the Colorado Supreme Court has declared that the state constitution provides broader protection to free speech than its federal counterpart, there are no Colorado decisions in the area that significantly conflict with federal first amendment law.

After the comment in *People v. Berger*, the court has never again referred to the potential of article II, section 10 of the Colorado Constitution to give broader protection to sexually explicit materials.[68] Furthermore, the chances of the court unequivocally declaring obscenity to be protected speech are

63. 185 Colo. at 89, 521 P.2d at 1246.
64. *Id.* at 89, 521 P.2d 1245-46.
65. COLO. CONST. art. II, § 10.
66. COLO. CONST. art. II, § 10 (emphasis added).
67. U.S. CONST. amend. I.
68. *See, e.g.*, People v. Tabron, 190 Colo. 149, 544 P.2d 372 (1976).

remote. The justices surely recognize that such a decision would probably be overturned by the voters either through the removal of justices from office[69] or the enactment of a constitutional amendment through the referendum process.[70] If courts do indeed watch the election returns, the Colorado court must have taken notice of recent events in California, where that state supreme court's interpretation of the California Constitution as prohibiting the death penalty was promptly overruled by the voters.[71]

V. SATISFYING THE *MILLER* STANDARDS

The next major case in Colorado obscenity law was *People v. Tabron*,[72] a 1976 supreme court decision that declared the state's obscenity statute to be unconstitutional for its failure to comply with the *Miller* standards. The statute at issue[73] had been passed in 1971, two years before the *Miller* case was decided. Therefore, this statute was drafted to comply with the then-prevailing federal constitutional standards enunciated in the *Memoirs* case.[74] In reviewing the conviction of a defendant who had exhibited the film "Deep Throat"[75] in a public theater, the Colorado Supreme Court in *Tabron* discussed the following aspects of the *Miller* standards.

A. *Lacking serious literary, artistic, political, or scientific value*

One major change made by *Miller* was that obscenity was no longer defined to be "utterly without redeeming social value," as in the *Memoirs* test, but rather had to "[lack] serious literary, artistic, political, or scientific value."[76] The court in *Tabron* ruled that the Colorado statute's use of the discarded *Memoirs* test was "[t]he most apparent defect" in its definition of obscenity.[77] The *Tabron* court recognized the argument that a state should be free to adopt the "utterly without redeeming social value" test because that test presents a heavier burden for the state to meet than the standard contemplated by *Miller*. Nevertheless, the court held that its approval of the old standard would deprive a defendant who may have relied on the new *Miller* standard of "fair warning that his action, when committed, constituted a crime."[78]

The *Tabron* court ignores the point that the *Memoirs* standard was rejected in *Miller* precisely because it placed on the prosecution "a burden

69. COLO. CONST. art. VI, § 25.

70. *Id.*, art. XIX, § 2.

71. *See* People v. Anderson, 6 Cal. 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 988 (1972), overruled by popular enactment of CAL. CONST. art. I, § 27, on Nov. 7, 1972.

72. 190 Colo. 149, 544 P.2d 372 (1976).

73. COLO. REV. STAT. § 40-7-101 (1971).

74. 383 U.S. 413 (1966). *See supra* notes 23-25 and accompanying text.

75. 190 Colo. at 151, 544 P.2d at 372. Rather than trying to compel the defendant to produce the film by means of a subpoena duces tecum, the prosecutors acquired from the Los Angeles Police Department a videotape of "Deep Throat" that had been edited differently from the version the defendant was showing. *Id.*, 544 P.2d at 372-73. The court indicated in dicta that the videotape had been admitted into evidence without a proper foundation. *Id.*, 544 P.2d at 373.

76. Miller v. California, 413 U.S. 15, 24 (1973).

77. 190 Colo. at 157, 544 P.2d at 378.

78. *Id.* at 158, 544 P.2d at 378.

virtually impossible to discharge under our criminal standards of proof."[79] In 1977, the United States Supreme Court approved an Illinois statute that retained "the *stricter Memoirs* formulation of the 'redeeming social value' factor."[80] Thus, states were free, despite *Miller*, to retain the stricter *Memoirs* test to assess the societal value of obscene materials. The Colorado court in *Tabron* was not justified in its concern that a defendant have notice of the standard, because when a defendant has notice of a stricter standard, *a fortiorari* he has notice of a less strict standard.

The 1981 Colorado statute does comply with the *Miller* standard that to be obscene, material must "[lack] serious literary, artistic, political, or scientific value."[81] There was testimony, however, in Colorado House committee hearings on the enacting bill that pointed up the limited usefulness of this part of *Miller* test.[82] The House State Affairs Committee heard testimony from Reverands Moore and Mahoney, both ministers of the Church of World Peace, that the members of their church use pornographic literature and "obscene" devices, both proscribed by the 1981 statute, in their worship services. According to the tenets of the Church of World Peace, "sexual energy is a profound religious force." Reverend Moore said he believed the 1981 statute discriminated against the religious practices of his church and in favor of the Judeo-Christian moral code.[83]

The committee members seemed somewhat nonplussed by this testimony, one legislator asking if the ministers were using the term "church" rather "loosely."[84] Reverend Mahoney replied that his group had been recognized as a church by the Internal Revenue Service.[85]

The above exchange may appear comical, but one serious issue raised is whether the *Miller* standard might be too limited, by protecting only prurient material that has value in four disciplines: art, science, literature, and politics. The absence of "religion" in this list may have implications arising out of the free exercise clause of the first amendment as well as the free speech clause.[86]

B. *Specifically Defined Conduct*

The second shortcoming of the Colorado statute, according to the court in *Tabron*, was its failure to comply with part (b) of the *Miller* standard, which said that a statute could only prohibit depictions or descriptions of sexual conduct that were "specifically defined by the applicable state law."[87] The pertinent part of the Colorado statute defined an obscene work as one

79. 413 U.S. at 22.

80. Ward v. Illinois, 431 U.S. 767, 773 (1977) (emphasis added).

81. COLO. REV. STAT. § 18-7-101(2)(c) (Supp. 1981).

82. *Colorado House State Affairs Committee Hearings on S.B. 38*, House Committee Room F, Apr. 14, 1981, 1:48-2:50 P.M. (available at the state archives on tape) [hereinafter cited as *House Hearings*].

83. *Id.*

84. *Id.*

85. *Id.*

86. *But see* Reynolds v. United States, 98 U.S. 145 (1878) (polygamy not protected under free exercise clause).

87. 413 U.S. at 24.

that "predominantly appeals to prurient interest, i.e., a lustful or morbid interest in nudity, sex, sexual conduct, sexual excitement, excretion, sadism, masochism, or sado-masochistic abuse . . . ."[88] The *Tabron* court commented: "Given their plain and ordinary meaning, the words 'nudity, sex, sexual conduct, sexual excitement . . . sadism, masochism, or sado-masochistic abuse,' are not representative of the specificity contemplated by the Supreme Court in *Miller*."[89]

The court arrived at this conclusion by comparing the language of the Colorado statute to the examples given in the *Miller* opinion of what a state statute could define for regulation under part (b) of the standard: "(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated; (b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals."[90]

In spite of *Tabron's* specific disapproval of the use of the terms "sadism" and "masochism," the 1981 Colorado statute has again included those terms in its definitional section.[91] Since the Colorado legislature has twice suffered the embarrassment of having its obscenity enactments struck down by the state supreme court, it is difficult to understand why the legislature has included language in a new statute that has been specifically disapproved by that court. Clues as to the origin of this anomaly may be seen in the legislative history of Senate Bill 38, which resulted in the current law.[92]

Republican Senator Ted Strickland, the prime sponsor of Senate Bill 38 and of much of the state's obscenity legislation in recent years, assigned the drafting of the 1981 statute to a group headed by Bob Miller, former Greeley District Attorney and now United States Attorney for Colorado.[93] Mr. Miller apparently modeled the Colorado legislation after the Texas obscenity statute,[94] the constitutionality of which he said had been upheld by the United States Supreme Court in *Crystal Theaters v. Wade*.[95] The case Mr. Miller referred to, however, was a memorandum decision involving a denial of stay, not a decision on the merits of the Texas statute. Indeed, at the time of the committee hearings, the only federal authorities upholding the constitutionality of the Texas statute were the memorandum decisions of two federal district courts that were affirmed in part by the Fifth Circuit Court of Appeals in *Red Bluff Drive-In, Inc. v. Vance*[96] on June 23, 1981, *after* the Colorado statute had been passed. The *Red Bluff* decision upheld the inclusion of

88. COLO. REV. STAT. § 40-7-101(1) (1971).

89. 190 Colo. at 159, 544 P.2d at 379.

90. 413 U.S. at 25.

91. COLO. REV. STAT. § 18-7-101(2)(b)(II) (Supp. 1981).

92. 1981 Colo. Sess. Laws 998.

93. *Colorado Senate Affairs Comm. Hearings on S. 38*, Senate Committee Room 320 E, Feb. 24, 1981, 9:18 to 10:37 A.M. (available at the state archives on tape) [hereinafter cited as *Senate Hearings*].

94. TEX. PENAL CODE ANN. §§ 43.21 to -.23 (Vernon 1974 & Supp. 1982).

95. 444 U.S. 959 (1979) (mem).

96. 648 F.2d 1020 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1264 (1982). There was brief mention of the Texas statute in Vance v. Universal Amusement Co., 445 U.S. 308 (1980) (per curiam), a case invalidating the use of Texas injunctive procedures to prevent the future showing of allegedly obscene motion pictures. Justice White remarked in a footnote to his dissenting

"sadism" and "masochism" in the definitional parts of the statute, but found several other portions of the Texas statutory scheme "questionable," and invoked the abstention doctrine to await state court decisions that might constitutionally construe those provisions.[97]

In upholding the inclusion of "sadism" and "masochism,"[98] the *Red Bluff* court relied on the 1977 Supreme Court decision of *Ward v. Illinois*.[99] Ironically, the Supreme Court in *Ward* upheld[100] the constitutionality of an Illinois obscenity statute that had wording nearly identical to that of the Colorado statute struck down in *Tabron*; the statute was approved primarily because the supreme court of Illinois had construed the statute in such a way as to comply with *Miller*.[101]

The defendant in *Ward* asserted that sado-masochistic materials could not be constitutionally proscribed because they were not expressly included within the examples *Miller* gave to explain part (b) of its standard.[102] Justice White, writing for the Court, replied, "but those specifics were offered merely as 'examples' . . . and . . . 'were not intended to be exhaustive.' "[103] Justice White went on to say, "[t]here was no suggestion in *Miller* that we intended to extend constitutional protection to the kind of flagellatory materials that were among those held obscene in *Mishkin v. New York* . . . ."[104]

The Colorado trial court relied on *Ward v. Illinois* in upholding the terms "sadism" and "masochism" as used in the 1981 statute.[105] But the Colorado Supreme Court may adopt the reasoning of Justice Stevens, who dissented in *Ward v. Illinois* because he believed the *Ward* majority improperly loosened the tight reins of specificity with which *Miller* had harnessed state obscenity regulation.[106] Of course, the potential constitutional infirmity in the 1981 statute could have been avoided if the drafters had adequately considered Colorado case law rather than relying solely on the Texas statute as their blueprint.

C. *Community Standards*

One of the major changes in the law of obscenity made by the Burger Court in *Miller* was the abandonment of the holding in *Jacobellis v. Ohio*[107] that the community standard must be national in scope.[108] The first prong of the *Miller* guidelines states that whether material is obscene must be judg-

opinion, "[s]ection 43.21, in turn, tracks nearly verbatim the *Miller* guidelines." 445 U.S. at 321 n.1.

97. 648 F.2d at 1027-36.
98. *Id.* at 1027.
99. 431 U.S. 767 (1977).
100. *Id.* at 770.
101. *Id.* at 775.
102. *Id.* at 773.
103. *Id.* (citing Hamling v. United States, 418 U.S. 87, 114 (1974)).
104. *Id.* (citing Mishkin v. New York, 383 U.S. 502, 505-10 (1966)).
105. People v. Seven Thirty-Five East Colfax, Inc., No. 81CV5779 (Denver Dist. Court, Mar. 15, 1982), *appeal docketed*, No. 82SA212 (Colo. Sup. Ct. May 4, 1982).
106. 431 U.S. at 777-82 (Stevens, J., dissenting).
107. 378 U.S. 184 (1964).
108. *Id.* at 195.

ed with reference to " 'the average person applying contemporary community standards.' "[109] The Court thus stated:

> It is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City. . . . People in different States vary in their tastes and attitudes, and this diversity is not to be strangled by the absolutism of imposed uniformity.[110]

In *People v. Tabron*,[111] the Colorado Supreme Court noted that the *Miller* decision had not given much guidance as to what the boundaries should be for the localized community standard.[112] In the companion case to *Tabron, People v. Tabron (II)*[113], the Colorado Supreme Court decided that a statewide community standard was required.

> It is fundamentally unfair that any person would be called upon to undergo a trial that would entail criminal penalties for the violation of a state obscenity statute without knowing what the standard is that will determine his guilt or innocence. The random decision of a judge or jury cannot be the standard, and the state statute should not be construed in a different manner in Denver, Littleton, Grand Junction, Colorado Springs, and Aspen.[114]

The court in *Tabron II* seemed to be concerned about equal protection of the law for defendants and uniformity of interpretation for courts. The Colorado Supreme Court's agreement with the *Miller* opinion that "a national standard would be an exercise in futility,"[115] however, is itself an exercise in self-delusion. A statewide standard for Colorado is necessarily an amalgam of the attitudes toward obscenity ranging from Boulder college students and the Capitol Hill denizens to the possibly more conservative citizens of rural areas and the suburbs. Thus, Colorado's spectrum of views on the subject of obscenity is to some extent a microcosm of the nation's views as a whole. The true "exercise in futility" may ultimately be the Burger Court's irrational replacement of a hypothetical, abstract nationwide standard with a local standard that most of the states are interpreting to be an equally hypothetical, abstract statewide standard.[116]

D. *The Objectionable Work Taken as a Whole*

Both prongs (a) and (c) of the three prong *Miller* standards[117] emphasized that an objectionable work must be considered in its entirety in making

109. 413 U.S. at 24 (quoting Kois v. Wisconsin, 408 U.S. 229, 230 (1972)).

110. 413 U.S. at 32-33 (citations omitted).

111. 190 Colo. 149, 544 P.2d 372 (1976).

112. *Id.* at 157, 544 P.2d at 377.

113. 190 Colo. 161, 544 P.2d 380 (1976). *Tabron* and *Tabron II* involved prosecution of the same defendant; however, in the second case the issue was defendant's exhibition of the film "Behind the Green Door."

114. *Id.* at 162-63, 544 P.2d at 381.

115. *Id.* at 162, 544 P.2d at 381.

116. The Colorado court noted in *Tabron II* that it was joining a number of other state courts that had adopted statewide community standards. *Id.* at 163, 544 P.2d at 381.

117. 413 U.S. at 24. *See supra* note 53 and accompanying text.

the determination of whether it is obscene. This principle was first promulgated in 1957 in the fountainhead case of *Roth v. United States*.[118] *Roth* rejected the common-law view, which had developed from the 19th century English case of *Regina v. Hicklin*,[119] that a work could be judged obscene based on an examination of isolated passages and the effect those passages might have on a particularly susceptible reader.[120] *Roth* found that such a test might encroach on first amendment freedoms by encompassing materials that, taken as a whole, deal with sex in a legitimate manner.[121]

In *People v. New Horizons, Inc.*,[122] the Colorado Supreme Court struck down the 1977 Colorado obscenity statute for violating the *Miller* requirement that obscenity be determined by considering objectionable material in its entirety. Although the statute included the "taken as a whole" language in two appropriate places in the definition of "obscene material,"[123] the Achilles heel of the statute was in its definition of "material": " 'Material' means any physical object, facsimile, recording, transcription, pictorial representation, motion picture, or reproduction . . . *but does not include the printed or written word*."[124]

The court reasoned that since "material" did not include the printed word, a jury examining a book or magazine with both pictures and text could consider only the pictures as being potentially obscene.[125] Thus, "the pictures could be declared obscene and the entire magazine banned under the statute without reference to whether the included text or other articles imbued the magazine with serious literary, artistic, political, or scientific value."[126]

The court in *New Horizons* recognized that this provision was designed to protect free speech by immunizing unillustrated literature from censorship. The court, however, declined to construe the statute so as to give effect to the legislative intent.[127]

The legislative history behind this particular blunder reveals the difficulty in passing constitutional obscenity legislation. In 1976, the legislature was faced with the task of drafting a new obscenity statute in the wake of the Colorado Supreme Court's decision in *People v. Tabron*.[128] There was still a Democratic majority in the House of Representatives as a consequence of the Watergate landslide in 1974. The voices of moderation prevailed, resulting in an obscenity statute that outlawed the promotion of all hard-core pornography to children and yet outlawed only live sex performances and sadomasochistic materials with respect to adults.[129] The 1976 statute also

118. 354 U.S. 476 (1957).
119. 3 Q.B. 360 (1868), *cited in* Roth v. United States, 354 U.S. 476, 489 (1957).
120. 354 U.S. at 489.
121. *Id.*
122. 616 P.2d 106 (Colo. 1980).
123. COLO. REV. STAT. § 18-7-101(1)(b) (Supp. 1981).
124. *Id.* at § 18-7-101(5) (emphasis added).
125. 616 P.2d at 110.
126. *Id.*
127. *Id.*
128. 190 Colo. 149, 544 P.2d 372 (1976).
129. 1976 Colo. Sess. Laws 555.

contained a provision exempting the printed or written word from its definition of "material."[130]

The 1976 statute was never litigated at the appellate level, because the Republicans regained control of the legislature during the 1977 session. As a result, the 1976 statute was repealed in favor of a more restrictive law that outlawed the promotion of a broader range of obscene materials to adults.[131] Unlike the 1976 bill, the original version of the 1977 bill did not contain the exemption for the written or printed word,[132] but Democratic Representative Wayne Knox added the exemption as an amendment in the House.[133] The Senate did not concur in the House amendments and a conference committee was appointed. The majority report recommended that the House withdraw the Knox amendment,[134] while the minority report, authored by Senator Ted Strickland and Representative Ken Kramer, recommended that the Senate accept the Knox amendment.[135] The House eventually adopted the minority report of the conference committee, repassed the bill,[136] and the Senate conceded to this decision.[137]

Thus, through the process of compromise and consensus, an element was introduced into the bill that conflicted with the original purpose of the redrafting process, which was to create an obscenity statute in compliance with the *Miller* standards.

E. *Material Must Be Patently Offensive*

Included in both part (b) of the *Miller* test and in the *Miller* "examples" for part (b) is the concept that material must be "patently offensive" to be obscene.[138] The 1981 Colorado obscenity statute, modelled after the Texas obscenity law, defines "patently offensive" as "so offensive on its face as to affront current community standards of *decency*."[139]

130. *Id.* at 556. According to Rep. Wayne Knox, it was Republican Don Friedman who originally suggested this provision be included, upon the recommendation of booksellers. Interview with Wayne Knox, State Rep. of Denver (Apr. 23, 1982).

131. 1977 Colo. Sess. Laws 982. The sponsors of the 1977 bill were, *inter alia*, Sens. Ted Strickland and Arch Decker (then a Democrat, and Republican candidate for Congress in the first Congressional district in 1982); Reps. Sam Zakhem and Ken Kramer (now U.S. Congressman, fifth district). According to Rep. Wayne Knox, the crusade to pass a tougher law may have been in part sparked by a comment purportedly made by Art Schwartz, a noted defense attorney in the field of obscenity law, that the 1976 law "legalized pornography." Interview with Wayne Know, State Rep. of Denver (Apr. 23, 1982).

132. S. 447, 51st Gen. Assembly, 1st Reg. Sess. (1977).

133. 1977 Colo. H.J. 1296, amend. 3.

134. 1977 Colo. H.J. 2020.

135. 1977 Colo. H.J. 2081-82.

136. 1977 Colo. H.J. 2090-91. Rep. Knox voted against the bill despite the acceptance of his amendment. *Id.* He said in an interview that he felt there were other constitutional problems with the bill, and that the Colorado Supreme Court had just decided to focus on that particular defect. Knox also criticized Sen. Strickland for getting obscenity legislation assigned to the state affairs committee instead of the judiciary committee, where, according to Knox, a more competent analysis of the constitutional ramifications of bills could be made. Interview with Wayne Knox, State Rep. of Denver (Apr. 23, 1982).

137. 1977 Colo. Sen. J. 2250.

138. 413 U.S. at 24-25.

139. COLO. REV. STAT. § 18-7-101(4) (Supp. 1981) (emphasis added). *See* TEX. PENAL CODE ANN. § 43.21 (a)(4) (Vernon Supp. 1982).

The Fifth Circuit Court of Appeals, reviewing the constitutionality of the Texas law in *Red Bluff Drive-In, Inc. v. Vance*,[140] found this definition to be questionable because of language in *Miller* and another Supreme Court case, *Smith v. United States*.[141] The court in *Red Bluff* indicated that obscenity should be judged with reference to the community's standards of *tolerance* rather than the community's standards of *decency*.[142] The Fifth Circuit commented that "the line between protected expression and punishable obscenity must be drawn at the limits of a community's tolerance rather than in accordance with the dangerous standards of propriety and taste."[143]

The Fifth Circuit decided to abstain from declaring the Texas statute unconstitutional in order to give state courts the opportunity to interpret the offending language in a manner consistent with constitutional standards.[144] The distinction drawn by the Fifth Circuit, however, may not rise to constitutional significance because that court overlooked the fact that a jury instruction approved in the *Miller* case referred to community standards of "decency," though the constitutional ramifications of that term were not included in the *Miller* Court's discussion of the instruction.[145]

F. *Obscenity in the Context of Verbal Assault*

In the Colorado case of *People v. Weeks*[146] a defendant was charged with violating the state telephone harassment statute[147] by making obscene telephone calls.[148] The trial court dismissed the charges, accepting defendant's argument, *inter alia*, that the statute was unconstitutionally applied to defendant because it did not comply with the *Miller* standards in its definition of "obscene."[149] The Colorado Supreme Court ordered the charges reinstated, finding that the requirements of *Miller* "are inapposite when the question is whether the state may prohibit unwanted verbal assaults on a person within the privacy of his own home."[150] The court pointed out that the gravamen of the offense was not the content of the speech, as it would be in an ordinary obscenity prosecution, but rather the manner in which the message was delivered—"the thrusting of an offensive and unwanted communication on one who is unable to ignore it."[151]

VI. THE BROAD DOCTRINES: STANDING, OVERBREADTH, VAGUENESS, AND EQUAL PROTECTION

In the preceding section there was a discussion of the *Miller* guidelines, which are specific to obscenity law. But broader doctrines of first amend-

140. 648 F.2d 1020 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1264 (1982).
141. 431 U.S. 291 (1977).
142. 648 F.2d at 1028-29 (citing Smith v. United States, 431 U.S. 291, 305 (1977)).
143. 648 F.2d at 1029.
144. *Id.*
145. 413 U.S. at 31.
146. 197 Colo. 175, 591 P.2d 91 (1979).
147. COLO. REV. STAT. § 18-9-111(1)(e) (1976).
148. 197 Colo. at 177, 591 P.2d at 93.
149. *Id.* at 180, 591 P.2d at 95.
150. *Id.*
151. *Id.* at 182, 591 P.2d at 96.

ment jurisprudence and constitutional law in general, such as standing, overbreadth, vagueness, and equal protection, can also have an impact on the consideration of the constitutionality of obscenity statutes.

A. *Standing*

In Colorado obscenity cases, the standing doctrine has been invoked when a defendant asserts that a statute is overbroad.[152] The general principle of standing is that a person to whom a statute may be constitutionally applied cannot challenge that statute on the ground that it could be unconstitutionally applied to others in situations not before the court.[153] An exception to this rule, however, is the situation in which a litigant claims that a statute regulating speech is overbroad because it infringes on protected areas of speech as well as prohibits that which it can legitimately prohibit.[154] In those cases, a litigant whose conduct might be prohibited under a more narrowly drawn statute is allowed to challenge the overbroad statute under the assumption that the existence of the statute might "chill" the exercise of those legitimate activities that the statute encompasses.[155] Under this rationale the defendant in *People v. Tabron*,[156] who had exhibited "Deep Throat," a film that probably could have been legitimately banned by a correctly drawn statute, was given standing to challenge the constitutionality of the statute.[157]

A recent Colorado Supreme Court case, *Marco Lounge, Inc. v. City of Federal Heights*,[158] elucidates the court's view of the standing principle. The *Marco* case was unique for several reasons: it was the first time the supreme court decided a case in which the issue was the use of zoning legislation to control obscenity; it was the first time a justice other than William Erickson wrote an opinion in the area;[159] and, it was the first time the obscenity issue split the court.[160]

The case involved a bar with live, nude dancers in Federal Heights.[161] The music stopped when the town board of trustees adopted a zoning ordinance that relegated all nude entertainment, pornography shops, and massage parlors to "E-1 Entertainment" districts.[162] The catch was that no such districts existed, and they could only be created by the voters through the initiative process.[163] With respect to Marco's case, the most significant provision of the ordinance declared: "Nothing herein shall apply to premises li-

152. *E.g.*, People v. Weeks, 197 Colo. 175, 591 P.2d 91 (1979).
153. Broadrick v. Oklahoma, 413 U.S. 601, 610 (1973).
154. *Id.* at 611-12.
155. *Id.* at 612.
156. 190 Colo. 149, 544 P.2d 372 (1976).
157. *Id.* at 152, 544 P.2d at 373.
158. 625 P.2d 982 (Colo. 1981).
159. Justice Lohr authored the majority opinion.
160. Justices Erickson, Dubofsky, and Quinn joined in the majority opinion, while the Justices who are generally regarded as more conservative, Lee, Rovira, and Chief Justice Hodges, dissented.
161. 625 P.2d at 984.
162. *Id.*
163. *Id.*

censed under the State Liquor Code, except that live, nude entertainment shall be prohibited in all such premises."[164] Neither the majority nor the dissenting opinion seemed to appreciate the effect of this provision on the legal theory of the *Marco* case.

Both the majority and the dissenting opinions in *Marco* agreed that the state, pursuant to the powers granted by the twenty-first amendment, may constitutionally prohibit live, nude entertainment in establishments operating with a state liquor license.[165] Both opinions cite the United States Supreme Court decision in *California v. LaRue*[166] as authority for that proposition.

Inexplicably, the dissenting justices stated there was no standing based on the failure of the Marco Lounge to seek enactment of an E-1 entertainment district by initiative before attempting to enjoin enforcement of the ordinance.[167] Justice Rovira stated in his dissent:

> At such time as Marco has attempted to establish an E-1 Entertainment District and the qualified electors of Federal Heights have defeated such a proposal, then it would be in a position to complain of a denial of freedom of speech, and it would have standing to challenge the constitutionality of the zoning ordinance.[168]

Why would Marco Lounge initiate a proposal to create an E-1 entertainment district, unless it planned on serving sarsaparilla instead of liquor? The justices seemed to forget that since the Marco Lounge had a liquor license it was specifically exempted from the zoning provisions of the ordinance and absolutely prohibited from providing nude entertainment.[169]

Thus, in granting standing to Marco Lounge under the loosened standing rules for claims of overbreadth, the majority contradicted the stance the court had taken two years earlier in *People v. Weeks*.[170] In *Weeks* the court denied an obscene caller standing to attack the telephone harassment statute under the following rationale:

> [U]se of the [overbreadth] doctrine is reserved for those defendants whose speech is at the fringes of that activity which the statute is designed to regulate. Those defendants whose speech is central to the interests which the statute seeks to protect and is clearly of a type regulated by the statute in question, cannot attack the statute as overbroad. They must demonstrate that the statute is unconstitutional as applied to them.[171]

Justice Lohr, in a footnote to his majority opinion in *Marco*, questioned whether the above statement was consistent with the overbreadth standing

164. *Id.* (quoting FEDERAL HEIGHTS, COLO. Ordinance § 10-1-5A.4 (Aug. 28, 1976)).
165. 625 P.2d at 986, 989.
166. 409 U.S. 109 (1972). The *LaRue* holding was later solidified in a post-*Marco* case, New York State Liquor Authority v. Bellanca, 452 U.S. 714 (1981).
167. 625 P.2d at 991 (Rovira, J., dissenting).
168. *Id.*
169. FEDERAL HEIGHTS, COLO. Ordinance § 10-1-5A.4 (Aug. 28, 1976).
170. 197 Colo. 175, 591 P.2d 91 (1979).
171. *Id.* at 179, 591 P.2d at 94.

doctrine as enunciated by the United States Supreme Court.[172] Indeed, Justice Erickson, in writing the above passage from *Weeks*, cited *Broadrick v. Oklahoma*[173] and a Colorado case, *Bolles v. People*,[174] neither of which supports the *Weeks* proposition.

Aside from the faulty *Weeks* precedent and the failure of the *Marco* court to apply the appropriate portion of the Federal Heights ordinance, the standing issue in *Marco* came down to the applicability of the following statement from *Broadrick v. Oklahoma*: "[P]articularly where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[175] Because Marco's conduct was plainly and legitimately proscribed by the statute, the question of his standing would depend on whether the statute was *substantially* overbroad.[176]

B. *Overbreadth*

1. Zoning Ordinances: *Marco Lounge, Inc. v. City of Federal Heights*

The majority opinion in *Marco Lounge, Inc. v. City of Federal Heights* was correct in finding the zoning ordinances at issue in that case substantially overbroad. For there to be an overbreadth problem, the statute must first be found to encompass protected conduct.[177] The *Marco* majority pointed out that certain forms of live, nude entertainment are protected expression under the first amendment,[178] citing, *inter alia, Doran v. Salem Inn, Inc.*[179] The United States Supreme Court in *Doran* gave "Ballet Africains" as an example of protected nude entertainment.[180]

The zoning ordinance of Federal Heights constituted a blanket prohibition of these protected forms of expression; nude dancing was allowed only in non-existent E-1 districts. The city and the dissenters suggested that the provisions for initiated elections to establish E-1 districts rescued the ordinance from facial invalidity. The majority rejected this contention pointing out that such "place" restrictions had only been upheld when the issuance of licenses or permits for the protected activity was governed by definite standards and the decision was subject to judicial review.[181] The majority stated:

> Putting aside the question whether the time and expense incident to such a procedure would in themselves unconstitutionally burden exercise of First Amendment rights, *see Bayside Enterprises, Inc. v. Carson*, . . . we hold that Marco's right to challenge the zoning plan cannot be conditioned on lack of success in a standardless, unre-

172. 625 P.2d at 986 n.5.
173. 413 U.S. 601 (1973).
174. 189 Colo. 394, 541 P.2d 80 (1975).
175. 413 U.S. at 615.
176. *See infra* text accompanying notes 178-216.
177. NAACP v. Alabama, 377 U.S. 288, 307 (1964).
178. 625 P.2d at 985.
179. 422 U.S. 922 (1975).
180. *Id.* at 933.
181. 625 P.2d at 988 n.10 (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975)).

viewable popular election.[182]

The majority opinion is persuasive as far as it goes. The central question, however, was not fully addressed. It is absurd to suggest that a regulatory scheme is valid which requires an individual to submit his right to engage in constitutionally protected expression to a popular election. As the majority in *Marco* pointed out, the possibility of censorship by a majority vote was the essential reason for enshrining the right of free expression in the Constitution.[183]

2. Obscenity Must Be Erotic: *People v. Tabron*

Some of the weakest overbreadth analysis in Colorado case law can be found in *People v. Tabron*.[184] The court faulted the Colorado obscenity statute not only because it failed to comply with the *Miller* standards, but also because it was "drawn overly broad" in its inclusion of "activities which could be described or depicted in some context other than an erotic one."[185] One of the Colorado court's authorities for the proposition that obscenity must be erotic was *Erznoznik v. City of Jacksonville*.[186] In *Erznoznik*, the United States Supreme Court declared a municipal ordinance unconstitutional that banned nudity on drive-in movie screens that were visible outside the movie premises from a public place. The Supreme Court stated that despite the aim of protecting children, the drive-in ordinance was overly broad because it was not limited to sexually explicit nudity, but would encompass non-erotic nudity such as the naked body of a war victim in a documentary film.[187]

In reaching its conclusion that the Colorado statute regulated non-erotic material, the Colorado court was taking the word "nudity" in the statute's definition of "obscene" out of context. The statute defined as "obscene" that which "predominately appeals to prurient interest, i.e., *a lustful or morbid interest in nudity* . . . ."[188] It is difficult to understand how nudity appealing to lustful interests could be depicted in a non-erotic context.[189]

3. Impingement on Privacy Interests: The 1981 Colorado Statute

The 1981 Colorado obscenity statute prohibits the "promotion" of "obscene devices" as well as obscene publications.[190] An obscene device is defined as "a device including a dildo or artificial vagina, designed or marketed as useful primarily for the stimulation of human genital or-

182. 625 P.2d at 988-89 (citing Bayside Enterprises, Inc. v. Carson, 450 F. Supp. 696 (M.D. Fla. 1978)).

183. 625 P.2d at 988.

184. 190 Colo. 149, 544 P.2d 372 (1976).

185. *Id.* at 159, 544 P.2d at 379.

186. 422 U.S. 205 (1975).

187. *Id.* at 213.

188. COLO. REV. STAT. § 40-7-101(1) (1971) (emphasis added).

189. Yet Justice Erickson so prefers this analysis that he once again employed it in a companion case to *Tabron*, Menefee v. Denver, 190 Colo. 163, 166, 544 P.2d 382, 383 (1976), which declared the Denver municipal obscenity ordinance unconstitutional.

190. COLO. REV. STAT. § 18-7-102(2)(a)(I) (Supp. 1981).

gans."[191] To promote an obscene device is to "manufacture, issue, sell, *give, provide*, lend, mail, deliver . . . or *to offer or agree to do the same*."[192]

The Fifth Circuit, interpreting the Texas progenitor of Colorado's statute in *Red Bluff Drive-In, Inc. v. Vance*,[193] found that the above sections, taken together, appeared overly broad because they swept within their ambit "acts the state cannot criminalize."[194] The Fifth Circuit stated:

> The literal language of the statute forbids the most sensitive and intimate conversations. For example, a husband could be found to have violated the letter of the statute by uttering in the privacy of the marital bedroom a verbal suggestion to procure for his wife one of the commercially available small appliances referred to as vibrators.[195] (Footnote omitted).

The court recognized that this kind of prohibition was inconsistent with the United States Supreme Court decision in *Stanley v. Georgia*,[196] which held that statutes regulating obscenity could not reach into the privacy of the home. The Fifth Circuit in *Red Bluff*, however, abstained from declaring the Texas statute unconstitutional. Instead, the court decided to await a narrowing construction by state courts.[197]

Representative Chris Paulson, a member of the Colorado House of Representatives, expressed concern about the privacy aspects of the Colorado statute in the 1981 House hearings on Senate Bill 38.[198] Paulson later offered the following amendment to the bill,[199] which was accepted and incorporated into the statute: "This section does not apply to a person's conduct otherwise prescribed [sic] by this section which occurs in that person's residence as long as that person does not engage in the wholesale promotion or promotion of obscene material in his residence."[200]

This amendment is an exercise in tautology and to paraphrase, the amendment says: This section does not apply to conduct in your residence as long as you do not engage in the conduct prohibited by this section in your residence. In essence, the section begs the question with respect to the overbreadth of the term "promote," except that it appears to give a blanket exemption for use of obscene desires in the residence.

4. Infringement on Protected Adult Activity: The 1981 "Display" Statute

The obscenity statute modelled after Texas law was not the only legislative activity in this area during the 1981 session. The legislature also suc-

191. *Id.* at § 18-7-101(3).
192. *Id.* at 18-7-101(6) (emphasis added).
193. 648 F.2d 1020 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1264 (1982).
194. *Id.* at 1029.
195. *Id.* at 1029-30.
196. 394 U.S. 557 (1969).
197. 648 F.2d at 1030. *See also* People v. Mizell, No. 82CR1053 (Dist. Ct. 4th Jud. Dist. Oct. 21, 1982) ("promote" found overbroad).
198. *House Hearings, supra* note 82.
199. 1981 Colo. H.J. 1235.
200. COLO. REV. STAT. § 18-7-102(6) (Supp. 1981).

ceeded in enacting a statute to limit childrens' access to obscene material.[201]

The most controversial portion of the statute prohibits the display of sexually explicit materials that are "harmful to children" at "news stands or any other business or commercial establishment frequented by children or where children are or may be invited as part of the general public."[202] The statute defines "harmful to children" as pertaining to those materials that appeal to the "prurient interest in sex of children," that are patently offensive to prevailing standards in the adult community as to *what is suitable for children*, and that are "lacking in serious literary, artistic, political, and scientific value *for children*."[203]

The legislature had attempted to pass similar legislation during the 1978 session, only to have it vetoed by Governor Richard Lamm.[204] In conjunction with his veto, the Governor initiated a voluntary agreement with major vendors of adult magazines to have their distribution outlets keep such magazines behind the counter or otherwise out of the reach of children.[205] The Governor also vetoed the 1981 statute, but this time the legislature overrode the veto by large margins.[206]

According to the Governor's veto message, he was advised by the Attorney General to disapprove the bill because it was unconstitutionally vague and overbroad.[207] The Governor stated that the legislation would "impinge upon and jeopardize the business of quality bookstores, galleries, and even grocery stores which might have one questionable book or magazine among its multitude of other goods and merchandise."[208]

The Governor's point has merit. It is common knowledge that many paperback books and magazines sold in grocery stores, drug stores, and at assorted other locations contain sexual descriptions that many adults would not find suitable for children. Under this statute, such establishments would have to prohibit children from coming in at all or, at a minimum, would have to physically segregate the book and magazine section from the rest of the store, and not allow children to enter this section.[209]

In a lawsuit brought by booksellers to enjoin enforcement of the statute, the Denver district court severed the "display" section from the statute, finding that it was unduly burdensome on booksellers and "chilling" to the "channels of dissemination."[210] In preparing their case for the Colorado Supreme Court, the booksellers can take comfort from the indications in *Marco Lounge, Inc. v. City of Federal Heights* that a majority of the justices on

201. COLO. REV. STAT. §§ 18-7-501 to -504 (Supp. 1981).
202. *Id.* at § 18-7-502(5).
203. *Id.* at § 18-7-501(2) (emphasis added).
204. Message from the Governor, 1981 Colo. H.J. 2263.
205. *Id.*
206. The Senate vote was 27-8 in favor of overriding Governor Lamm's veto of H.B. 1310, 1981 Colo. Sen. J. 2597. The House vote was 47-15 in favor of overriding. 1981 Colo. H.J. 2328.
207. Message from the Governor, 1981 Colo. H.J. 2263.
208. *Id.*
209. *See* Tattered Cover, Inc. v. Tooley, No. 81CV09693, slip op. at 4 (Denver Dist. Ct. Jan. 26, 1982), *appeal docketed*, No. 82SA85 (Colo. Sup. Ct. Mar. 23, 1982).
210. *Id.* at 5.

the supreme court look unfavorably on regulatory schemes that are excessively burdensome on first amendment rights.[211]

The Colorado district court, however, upheld the part of the statute prohibiting the sale of sexually explicit materials to minors,[212] relying on *Ginsberg v. New York*.[213] *Ginsberg* was a United States Supreme Court case holding that states have the power to control the dissemination of certain material to minors even though that same material might involve protected expression if distributed to adults.[214] Also left intact by the Colorado district court was a controversial portion of the statute that prohibits the admission of children to sexually explicit movies without reference to whether they are accompanied by a parent.[215]

C. *Vagueness*

The critical vulnerability of the 1981 obscenity statute appears to be a section that exempts from prosecution "any *accredited* theater, museum, library, school, or institution of higher education."[216] Examining the term "accredited" in the case of *People v. Seven Thirty-five East Colfax, Inc.*,[217] the Denver district court said: "Although this term is frequently mentioned in conjunction with 'schools' it is not a common, or even appropriate term in connection with museums, libraries and theaters."[218] The court found the term unconstitutionally vague,[219] as did the district court judge considering a parallel provision in the "display" statute in *Tattered Cover, Inc. v. Tooley*.[220]

The "accredited" section in the obscenity statute was not in the original bill, but rather, was introduced into the bill by an amendment reminiscent of the fatal defect in the 1979 legislation. Senator Ted Strickland, who offered the amendment,[221] said in an interview that the amendment was offered to protect legitimate concerns and thereby gain uniform support for the bill in the general assembly.[222]

The discussion of this section that took place during the House hearings casts some light on the underlying rationale or lack thereof.[223] Republican Representative James Lee, an attorney, asked Bob Miller, a proponent of the

211. 625 P.2d at 988.

212. Tattered Cover, Inc. v. Tooley, No. 81CV09693, slip op. at 4 (Denver Dist. Ct. Jan. 26, 1982), *appeal docketed*, No. 82SA85 (Colo. Sup. Ct. Mar 23, 1982).

213. 390 U.S. 629 (1968).

214. *Id.* at 637-39.

215. COLO. REV. STAT. § 18-7-502(2) (Supp. 1981).

216. *Id.* at § 18-7-104(1)(b) (emphasis added).

217. No. 81CV5779 (Denver Dist. Ct. Mar. 15, 1982), *appeal docketed*, No. 82SA212 (Colo. Sup. Ct. May 4, 1982). *See also* People v. Mizell, No. 82CR1053 (Dist. Ct. 4th Jud. Dist. Oct. 21, 1982) ("accredited" section struck down as denial of equal protection).

218. *Id.* at 5.

219. *Id.* at 6.

220. No. 81CV90693, slip op. at 6 (Denver Dist. Ct. Jan. 26, 1982).

221. 1981 Colo. Sen. J. 629.

222. Interview with Ted Strickland, State Senator, (Apr. 23, 1982). A legislative drafting office file on the 1977 statute reveals that the word "bona fide" was also considered for use in this type of provision. Sen. Strickland also commented that one substitute for the offending term that was considered, but rejected, was "legitimate."

223. *See House Hearings, supra* note 82.

bill, "[w]hat's the definition of an 'accredited theater?' "[224] Miller replied that he did not know.[225]

Senator Strickland spoke up: "That word was carefully chosen because of the reference to institutions of higher education . . . an accredited theater is part of that institution."[226]

* * *

"You're not talking about commercial theaters?" asked Representative Lee.[227]

"No," Senator Strickland replied.[228]

What is remarkable about this dialogue is that it occurred, and yet no one attempted to resolve the ambiguity in the bill.

D. *Equal Protection of the Law: The Handicapped and the Prohibition of Obscene Devices*

In the case challenging the parallel Texas obscenity statute, one of the plaintiffs, a paraplegic, raised an equal protection claim against the statute's proscription of obscene devices.[229] This plaintiff argued that enforcement of the statute would deny him the constitutional right to a normal sex life.[230] The Fifth Circuit dismissed this argument with the comment that no such constitutional right has been recognized.[231]

The 1981 Colorado statute defines obscene devices as devices "designed or marketed as useful primarily for the stimulation of human genital organs."[232] This language is broad enough, however, to include prosthetic implants and electrode devices designed to aid impotent men. The right of those handicapped by impotence to use such devices, and the concomitant right of persons to sell such devices, should be recognized on the basis of the privacy right enunciated in *Griswold v. Connecticut*[233] and the right of personal autonomy recognized in *Roe v. Wade*.[234]

VII. Obscenity Law and the Relationships Between the Levels and Branches of Government

A. *Levels*

1. Federal-State: The Abstention Doctrine

The abstention doctrine allows federal courts to abstain from exercising

224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.*
228. *Id.*
229. Red Bluff Drive-In, Inc. v. Vance, 648 F.2d 1020, 1028 (5th Cir. 1981), *cert. denied*, 102 S. Ct. 1264 (1982).
230. *Id.*
231. *Id.*.
232. Colo. Rev. Stat. § 18-7-101(3) (Supp. 1981).
233. 381 U.S. 479 (1965) (there is a privacy right in connection with birth control devices).
234. 410 U.S. 113 (1973) (struck down an abortion law for infringing on the constitutional right of personal autonomy).

jurisdiction over constitutional challenges to state action if the resolution of state law questions by the state courts might make the federal constitutional questions moot.[235] It is not surprising that in the one federal court encounter with the thorny problem of the constitutionality of a Colorado obscenity statute, this doctrine was invoked. In *Bergstrom v. Ricketts*,[236] an inmate of the Colorado State Penitentiary brought an action alleging that the mail room officer of the penitentiary had failed to deliver him certain books on the grounds that they were obscene.[237] The Board of Corrections had adopted a regulation, pursuant to the 1979 obscenity statute, which banned "obscenity contraband," and the prisoner contended the regulation was invalid.[238] The district court abstained from deciding the constitutionality of the statute. "[W]hen the state court's interpretation of the statute or evaluation of its validity under the state constitution may obviate any need to consider its validity under the Federal Constitution, the federal court should hold its hand, lest it render a constitutional decision unnecessarily."[239]

2. State-City: Preemption

Pierce v. City and County of Denver[240] involved a suit brought by the manager of a university bookstore against the city to enjoin enforcement of an obscenity ordinance.[241] The city council had moved quickly to adopt a new ordinance in the wake of the invalidation of its previous ordinance in *Menefee v. City and County of Denver*.[242] The Colorado Supreme Court in *Pierce* held that the court's adoption of statewide community standards in *Tabron II* rendered the regulation of obscenity a matter of statewide concern under the Colorado Constitution.[243] Therefore, the city ordinance was invalid because it exceeded the state legislative grant of power.[244]

B. *Branches: Legislative-Judicial*

The judiciary in Colorado has not been inclined to assist the legislature by construing obscenity statutes so as to bring them into compliance with constitutional guidelines; instead the courts have completely invalidated these statutes, forcing the legislature "back to the drawing board."

1. Original Proceeding

One avenue open to the legislature for expediting the "trial-and-error" process that has developed in obscenity legislation is the "original proceed-

235. *See* Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

236. 495 F. Supp. 210 (D. Colo. 1980).

237. *Id.* at 210. The action was brought under 42 U.S.C. § 1983. The plaintiff asserted that the refusal to deliver the books he purchased violated his first amendment rights.

238. *Id.* at 211.

239. 495 F. Supp. at 212 (quoting City of Meridian v. Southern Bell Tele. & Tele. Co., 358 U.S. 639, 641 (1959)).

240. 193 Colo. 347, 565 P.2d 1337 (1977).

241. *Id.* at 348, 565 P.2d at 1337-38.

242. 190 Colo. 163, 544 P.2d 382 (1976). This was a companion case to People v. Tabron, 190 Colo. 149, 544 P.2d 372 (1976).

243. *See* 193 Colo. at 349, 565 P.2d at 1339; COLO. CONST. art. XX, § 6.

244. 193 Colo. at 350-51, 565 P.2d at 1339-40.

ing." The Colorado Constitution provides: "The supreme court shall give its opinion upon important questions upon solemn occasions when required by the governor, the senate, or the house of representatives; and all such opinions shall be published in connection with the reported decision of said court."[245]

Despite the seemingly mandatory nature of this language, the supreme court has generally resisted giving guidance to the legislature on the grounds that such decisions must be made in the context of a concrete controversy.[246] While formal interrogatories have never been submitted on an obscenity statute, an informed source in the legislature imparted the information that a senior senator of the majority party approached Chief Justice Hodges on the subject informally and has not received an encouraging response.[247]

2. Authoritative Construction

In promulgating new guidelines for state obscenity regulation, the United States Supreme Court was careful to say in *Miller v. California*,[248] that states did not have to meet the guidelines by passing new obscenity statutes.[249] Instead, an authoritative construction could be placed on existing state statutes by state courts thereby incorporating the *Miller* standards.[250] A number of state courts accepted this suggestion.[251]

The Colorado Supreme Court, however, did not. In *People v. Tabron*, the court stated: "What the prosecution urges, under the guise of 'authoritative construction,' is a 'wholesale rewriting' of the Colorado Obscenity Statutes."[252] The court indicated that such wholesale rewriting would amount to a judicial usurpation of legislative power and thus, a violation of the doctrine of separation of powers.[253]

But in *People v. New Horizons, Inc.*,[254] the case involving the 1979 statute and its exemption for the printed word, the court did not have the excuse that authoritative construction of the statute would involve wholesale rewriting. The court could have easily construed the offending provision in accordance with the legislative intent that publications could not be declared obscene on the basis of the printed word alone. The court, however, avoided the issue of construction by declaring "we are bound by the clear language of the statute and must declare it unconstitutional."[255] The stance of the Colorado court seems inconsistent with the United States Supreme Court's

245. COLO. CONST. art. VI, § 3.

246. *See* In Re Interrogatories Propounded By the Senate, 131 Colo. 389, 291 P.2d 1013 (1955).

247. The source asked that neither he nor the senior senator be identified. *See* Note, *Constitutionality of Obscenity Statutes*: People v. New Horizons, 52 COLO. U.L. REV. 575, 580 (1981).

248. 413 U.S. at 24 n.6.

249. *Id.*

250. *Id.*

251. Note, *Constitutionality of Obscenity Statutes*: People v. New Horizons, 52 COLO. U.L. REV. 575, 582 n.44 (1981).

252. 190 Colo. 149, 160, 544 P.2d 372, 379 (1976).

253. *Id.* (quoting Art Theater Guilde, Inc. v. State *ex. rel.* Rhodes, 510 S.W. 2d 258 (Tenn. 1974)).

254. 616 P.2d 106 (Colo. 1980).

255. 616 P.2d at 110.

view as expressed in *Broadrick v. Oklahoma*.[256] According to *Broadrick*, the striking down of an entire statute under the overbreadth doctrine is a remedy that should be used "sparingly and only as a last resort," and instead a "limiting construction" should be employed whenever possible.[257]

3. Severability

Having abandoned any hope of getting the supreme court to authoritatively construe its enactments, legislators have sought salvation in the concept of severability. Senator Strickland expressed his disappointment that the supreme court had failed to sever the offending language in the 1979 statute that exempted the printed word.[258] Strickland emphasized that in the 1981 statute the draftsmen had included two severability clauses, one at the end of the definitional section[259] and one at the end of the entire statute.[260]

Senator Strickland's remarks expose a basic misunderstanding of the canons of statutory interpretation. It is a well-established principle that penal statutes must be strictly construed in favor of those whose interests they adversely affect,[261] and that courts cannot construe a statute in a manner that will criminalize conduct that was previously not criminal.[262] It would have been inconsistent with these principles for the supreme court in *New Horizons* to strike from the 1979 statute the offending language exempting the printed word and thereby create a new class which would be subject to penal sanctions—the purveyors of exclusively narrative pornography.

Senator Strickland is not the only person who failed to recognize these principles. In *Tattered Cover, Inc. v. Tooley*,[263] the district court judge solved the vagueness problem involving the language "accredited theater" in the "display" statute[264] by striking the entire exemption for accredited institutions.[265] Thus, the court extended the reach of the statute. Theoretically, the revised statute would be violated when a college bookstore manager sells a book that depicts sexual matters unsuitable for children to a seventeen-year-old freshman.

The district court judge examining the 1981 obscenity statute has apparently arrived at a more reasonable construction by striking only the word "accredited"[266] from the exemption provision. If this construction is upheld on appeal, the severability clause will not have solved the legislature's prob-

256. 413 U.S. 601 (1973).
257. *Id.* at 613.
258. *House Hearing, supra* note 82.
259. COLO. REV. STAT. § 18-7-101(9) (Supp. 1981).
260. *Id.* at § 18-7-105.
261. Van Gerpen v. Peterson, 620 P.2d 714 (1980).
262. Hamling v. United States, 418 U.S. 87, 115-16 (1974).
263. No. 81CV09693 (Denver Dist. Ct. Jan. 26, 1982), *appeal docketed*, No. 82SA85 (Colo. Sup. Ct. Mar. 23, 1982).
264. *Id.* at 6.
265. COLO. REV. STAT. § 18-7-503 (Supp. 1981).
266. People v. Seven Thirty-five East Colfax, Inc., No. 81CV5779, slip. op. at 5-6 (Denver Dist. Ct. Mar. 15, 1982), *appeal docketed*, No. 82SA212 (Colo. Sup. Ct. May 4, 1982).

lem. The statute will still have to be amended to account for the new possibility that pornographic theaters may qualify under the exemption clause.

VIII. CONCLUSION

The story of obscenity law in Colorado has been one of a legislature that is ill-prepared for the task of drafting constitutional statutes, and a court that is unwilling to do the job for the legislature. As a result, Colorado has not had an enforceable obscenity statute for ten years. In the future, the legislature must avoid the seductive shortcut of selecting another state's law as a model on which to base a new Colorado obscenity statute. Instead, legislators must be sensitive to both Colorado and federal case law in this area and carefully scrutinize any amendments to the original bill.